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No. 94-1966

In the

# Supreme Court of the United States

October Term, 1995

DWIGHT J. LOVING,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

## BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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## QUESTIONS PRESENTED*

1. Did the Court of Military Appeals err in upholding the issuance by the President of the constitutionally-necessary aggravating factors for death penalty offenses in the military (a) where the court found only an implicit delegation of that power by Congress to him; (b) the court was unable to find any explicit statutory language setting forth any intelligible principles to guide the President's discretion, and (c) where the delegation, if sustained, would unite in the President the power to make and execute the laws?

2. May a defendant be constitutionally sentenced to death by a lay court-martial panel of fewer than twelve persons?

*These questions are restated versions of the questions in the petition, but are substantively unchanged.

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## BRIEF OF PUBLIC CITIZEN, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The petition in this case raises two sets of questions that apply to every court martial in the Armed Forces in which the death penalty has been imposed or in which it will be sought. These questions were resolved in favor of the government by what was then called the United States Court of Military Appeals, and which has since been renamed the United States Court of Appeals for the Armed Forces. They were previously presented to this Court in *Curtis v. United States*, No. 91-99. However, by the time that the Court considered the petition in *Curtis*, the case had been remanded for further proceedings, and on that basis the Solicitor General urged the Court to deny the petition, which it did, with Justices White and Blackmun dissenting. 502 U.S. 1097 (1991).

In this case, the Court of Appeals for the Armed Forces, refused to reconsider *Curtis*, just as it had previously declined to reconsider it when the defendant in *United States v. Murphy*, No. 64,926 (USCAAF, argued June 5, 1995), specifically moved it to

do so, on an expedited and bifurcated basis, because of the applicability of the issues to every pending capital case. Order of September 23, 1993. Thus, it is clear that the court below will not revisit *Curtis*, thereby enabling this Court to avoid deciding these issues.

*Curtis* is still pending below, but petitioner Loving now asks this Court to review the issues that it declined to decide on interlocutory review in *Curtis*. Since the sentence of death imposed on petitioner is final, and not subject to further direct review, the Court should grant certiorari to consider these threshold issues that apply to the eight members of the Armed Services who are now subject to death sentences, as well as to every future case in which the death penalty is sought. If either of petitioner's claims is sustained, the defects must be corrected, as they surely can by appropriate action of Congress; if the government is upheld, then no court, prosecutor, or defense counsel need consider them further. As a thoughtful district judge (James B. McMillan, deceased) once observed in a similar context, "[t]he time to put on the roof is before it starts raining. The question of the constitutionality of the Price-Anderson Act should be decided now." *Carolina Environmental Study Group v. United States*, 431 F. Supp. 203, 226 (W.D. N.C. 1977), *rev'd on other grounds*, 438 U.S. 59 (1978).

## INTEREST OF THE AMICUS

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members throughout the United States. Through its Litigation Group, it has been lead counsel and otherwise participated in many of this Court's leading separation of powers cases, such as *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Mistretta v. United States*, 488 U.S. 361 (1989), and *Weiss v. United States*, 114 S. Ct. 752 (1994). It has also participated as co-counsel in *Curtis* and *Murphy*, *supra*, two other cases raising the identical issues presented by this petition.

This brief is being filed, with the written consents of the parties, because of Public Citizen's long-standing commitment to principles of separation of powers, which it believes were



disregarded by the Court of Military Appeals when it addressed these issues. Although Public Citizen agrees with petitioner, it is filing this brief to emphasize certain points that do not stand out in the petition, but that are central to the question of whether this Court should grant review.

## STATEMENT OF THE CASE

Petitioner, an Army private at the time of the offense, was convicted by a court-martial, consisting of eight Army officers, of having committed two murders, as well as several robberies and other crimes. Both victims were taxi drivers; one happened to be in the Army, working off-duty for extra money, and the other was a retired Army sergeant. One murder occurred on the base at Fort Hood, at the end of a ride that began in Killeen, Texas, and the other occurred in town, but began at Fort Hood.

The prosecution sought the death penalty under Articles 118(1) and 118(4), of the Uniform Code of Military Justice, 10 U.S.C. § 918(1) and §918(4) ("UCMJ"), which authorize the death penalty for premeditated and felony murders. The court-martial members, none of whom were judges or lawyers, voted to impose a death sentence. The conviction and death sentence were upheld by the lower courts over a variety of objections, including those raised by the petition — that the President lacks the authority under the applicable statutes and the Constitution to prescribe the aggravating factors that are a constitutional prerequisite for the imposition of any death penalty, and that a court-martial of fewer than twelve members may not impose the death penalty.

In order to clarify the issues relating to the power of the President, it is necessary to review briefly certain death penalty decisions of this Court and the Court of Military Appeals. Because the court below refused to reconsider its prior opinion in *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991), which decided these issues, we will then discuss *Curtis* before explaining why the writ should be granted.

A. *The Death Penalty in the Armed Forces*

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court ruled that the Eighth Amendment places significant limits on the government's power to impose the death penalty. Of particular relevance to this case is the requirement that the class of those convicted of capital crimes must be narrowed by rational criteria that confine the fact-finder's discretion concerning whether the particular circumstances warrant the death penalty. Although there was no reason to doubt the applicability of *Furman* to the military, it was not until 1983 that the Court of Military Appeals ruled that courts-martial could not impose death sentences because the military justice system failed to require that the sentencing authority "make specific findings as to individualized aggravating circumstances." *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). Although not necessary to the decision there, the *Matthews* court suggested that the gap could be filled either by Congress or the President. *Id.* at 380-81.

The President did not wait for Congress, but instead issued an Executive Order in January 1984 that amended the 1969 Manual for Courts-Martial by establishing a capital sentencing provision that sets forth specific aggravating factors for military death penalty offenses. Exec. Order 12,460, 49 Fed. Reg. 3169 (1984). In August 1984, when the current Manual came into effect, Executive Order 12,460 was rescinded, and the capital sentencing scheme was incorporated in Rule for Courts-Martial 1004. Manual for Courts-Martial, 1984, Exec. Order 12,473, 49 Fed. Reg. 17,152 (1984), quoted at App. 354a-360a.

As authority for Rule 1004, the President cited only the Constitution and Chapter 47 of Title 10, which is the entire UCMJ that was enacted in 1950, although the drafters of the Rule relied on Articles 18, 36, and 56 of the UCMJ and the President's authority as Commander-in-Chief of the Armed Forces under Article II, § 2, cl. 1 of the Constitution. However, the first of these, Article 18, does not delegate to the President the power to establish aggravating factors, but merely permits a court-martial to impose "any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter," subject to "such limitations as the President may prescribe." 10



U.S.C. § 818. The second, Article 36, authorizes the President to prescribe "[p]retrial, trial, and post[illegible]ial procedures, including modes of proof" for courts-martial, "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

The third statutory provision, Article 56, does not grant any authority to the President, but rather precludes a court-martial from imposing punishments which "exceed such limits as the President may prescribe[.]" 10 U.S.C. § 856. It makes no mention of the death penalty, although a number of provisions of the UCMJ provide a specific, and very different role for the President in capital cases. *See infra* at 13-14. Finally, the Commander-in-Chief clause in Article II makes no mention of the President's role in death penalty cases in the military, nor in any other matters relating to courts-martial; instead, the Constitution gives to Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." Article I, § 8, cl. 14.

B. *The Decisions in Curtis*

Ronnie Curtis was convicted of murder, and the court-martial sentenced him to death, relying on Presidentially-promulgated Rule 1004 to supply the necessary aggravating factors. On appeal, Curtis challenged the President's authority to establish death penalty aggravating factors. The Navy-Marine Corps Court of Military Review, sitting en banc, rejected this argument. *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc) (260a). The court ruled that death penalty aggravating factors are procedural rather than substantive and thus fall within the congressional delegation to the President of power to prescribe court-martial procedures. *Id.* at 280a-282a, citing 10 U.S.C. § 836 (1982). The court also found that Congress had provided the President with sufficient guidance to limit his discretion in establishing a military death penalty system. *Id.* at 282a-284a. Judge Albertson dissented from this portion of the opinion, reasoning that, even if Congress did delegate to the President authority to establish a military death penalty system,

such a delegation was unconstitutional because it was not accompanied by "specific and detailed standards" to guide the President. *Id.* at 338a.

On further appeal, the Court of Military Appeals bifurcated its consideration of the case, resolving systemic challenges to the imposition of the death penalty in the military before considering factual arguments unique to Curtis. Thus, in the first phase in *Curtis*, the court rejected the argument that the President acted without authority in establishing death penalty aggravators for courts-martial. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (Appendix F, App. 346a).

While the drafters of the Executive Order creating Rule 1004 specified three Articles in the UCMJ as sources for the President's authority to prescribe aggravating factors, the Court of Military Appeals barely mentioned them, and never attempted to demonstrate how they specifically authorized the President to establish aggravating factors for the death penalty. The court relied heavily on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (app. 362a-363a), but it specifically abjured any reliance on the President's inherent authority as Commander in Chief. App. 367a n.9. It also discussed at some length this Court's non-delegation opinions, including in particular *Mistretta v. United States*, 488 U. S. 361 (1989), but never pointed to specific statutory language by which to judge the delegation's validity.

Instead, the court upheld Rule 1004 on the theory that Congress did not object to the President's exercise of that power and seemingly approved it when it adopted its own military death penalty statute, limited to espionage, which sets forth three specific aggravating factors and explicitly authorizes the President to prescribe others for that crime, in an act that was passed a year *after* the President issued Rule 1004. *See* Pub. Law No. 99-145, § 534(a), 99 Stat. 634 (1985) (codified at UCMJ Art. 106a, 10 U.S.C § 906a). The court observed that "Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial" (App. 362a), and that it was "unaware of any indication of legislative displeasure with the President's action or any legislative effort at that time to undo his action to curtail the use of capital punishment in



courts-martial." App. 364a. Similarly, the court argued that the "failure of Congress to complain about the content of [Rule 1004] can be construed to be ratification" (App. 366a), and the "implication" from the passage of the special death penalty provision governing espionage is "that Congress does not consider the President's prescribing 'aggravating factors' to be in diminution of its own legislative power." *Id.* at 367a. Thus, the court said, "we conclude that Congress has — at least, implicitly — delegated this task [of prescribing the aggravating factors] to the President . . ." App. 367a n.9.

Satisfied that it had surmounted the statutory issues, the court turned to the constitutionality of the implicit delegation. To find the necessary guidance from Congress, the court again relied on the subsequently-enacted Article 106a and its authorization for the President to prescribe additional aggravating factors for espionage. From Article 106a's reference to Article 36, the court concluded that "[a]pparently Congress wished the President to look to the 'principles of law' applied in federal criminal cases in determining what should be the 'aggravating factors' for capital cases tried by court-martial." App. 368a. The court proceeded to examine the source of each of the aggravating factors in Rule 1004(c) (App. 368a-374a) in order to support its finding that "they reflect policy expressed by Congress in various statutes — including several punitive articles of the Uniform Code of Military Justice — and also conform generally with the Model Penal Code and with policies expressed in the statutes of many of the 36 states which authorize the death penalty." App. 368a. It reinforced its conclusion by pointing out that "the President acted in reliance on legislative policy expressed in the Uniform Code of Military Justice and in other federal statutes," App. 374a, although Rule 1004 was issued precisely because none of those statutes contains the specificity required by *Furman*. The court then returned to Article 106a and its death penalty provisions for espionage, which it saw as an "approval of the standards which the President theretofore had employed" for all capital offenses covered by Rule 1004. App. 375a. Because the court found that "Congress not only acquiesced in his performance of this task but also tacitly ratified the 'aggravating factors' when it enacted Article 106a of the Uniform Code," it concluded that the delegation was proper. *Id.*

The opinion also rejected Curtis's Eighth Amendment argument that a defendant may not be sentenced to death by a panel of fewer than 12 lay persons. App. 377a; see also *id.* at 383a (Sullivan, C.J., concurring). In rejecting this contention, the court gave several reasons:

> Under RCM 1004, the court-martial members — who have been chosen pursuant to the criteria set forth in Article 25 of the Code, 10 USC § 825 — must be unanimous in finding aggravating factors. The military judge can, at least, recommend a commutation of a death sentence adjudged; and the convening authority is empowered to commute the sentence. Furthermore, a Court of Military Review, composed of trained appellate military judges, must thoroughly review the law, the facts, and the appropriateness of the accused's sentence.

App. 376a-377a (footnotes omitted). Although the court's statements may be factually correct, they do not explain why a civilian court may not impose a death penalty with a jury of fewer than 12 persons, but a court-martial may do so with as few as five members.

## REASONS FOR GRANTING THE WRIT

At stake in this case is whether members of the armed forces may be sentenced to death for offenses for which Congress has failed to specify the constitutionally-necessary aggravating factors, but where the President has acted to fill in that void, and if so, may the death penalty be imposed by fewer than 12 lay persons. In addition to petitioner, there are seven other servicemen who have been sentenced to death, but that hardly begins to define the affected class. Every person who is now or may in the future be charged with a crime for which the UCMJ permits the death penalty has a vital interest in the outcome of this case. That interest is triggered the moment that a capital charge is preferred, because the possibility that the ultimate punishment may be imposed potentially affects every strategic and tactical judgment in the case.



The military also has a vital interest in a definitive resolution of these issues. Until that occurs, every accused will have to raise both sets of issues, on direct appeal and on habeas corpus, as well as the numerous other issues that must be raised at every stage of a capital case, thereby consuming valuable resources of the courts and prosecutors. Indeed, the opinion below in this case is 221 pages in the appendix, and it does no more than mention the issues contained in the petition. If Rule 1004 is ultimately invalidated, or if 12 person panels are held to be mandatory in military death penalty cases, all eight military prisoners on death row will have their sentences reversed, and all of the death penalty litigation currently pending in the military courts will be radically altered. But whatever the outcome, the sooner these issues are resolved, the fewer of these challenges there will be to litigate. Thus, concerns for judicial efficiency and fiscal economy support a prompt resolution of the military death penalty's constitutionality.

### I. THE PRESIDENT'S AUTHORITY TO PROMULGATE AGGRAVATING FACTORS FOR CRIMES COMMITTED BY SERVICE MEMBERS PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE ARMED FORCES WHICH THE COURT BELOW DECIDED IN A MANNER INCONSISTENT WITH FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND SEPARATION OF POWERS.

A. Beyond the need to resolve both issues promptly, review is appropriate in order to resolve a conflict between the decision below regarding the President's authority and the Ninth Circuit's decision in *United States v. Harper*, 729 F.2d 1216 (1984), and the Fifth Circuit's ruling in *United States v. Woolard*, 981 F.2d 756, *rehearing denied*, 990 F.2d 820 (1993). Here, the Court of Military Appeals held that the President could, without violating separation of powers, prescribe death penalty aggravating factors, thereby aggregating in one person the power to decide what the law shall be, who shall prosecute the offense, and who shall be the judge and jury. In *Harper*, the Ninth Circuit overturned a district court's ruling that federal courts could adopt guidelines in order to

limit the circumstances in which the death sentence could be imposed under the Espionage Act, 18 U.S.C. § 794. The court concluded that such limitations must be "expressly articulated by the legislature in the statute authorizing the death penalty." *Id.* at 1225. In reaching that conclusion, the court noted that the Justice Department's brief in that case, as well as its public position in a number of other settings, was that it was the responsibility of Congress to satisfy the requirements of *Furman*. *Id.* at 1225-26. And in *Woolard*, the Fifth Circuit rejected the government's attempt to seek the death penalty without post-*Furman* congressional action. The Court of Military Appeals' holding that the President may prescribe aggravating factors is inconsistent with the Ninth Circuit's approach, if not its holding, as well as the Justice Department's stated position, at least until *Woolard* and *Curtis*. Indeed, the district court's approach in *Harper* would have been far less offensive to principles of separation of powers than the result below, yet the Ninth Circuit firmly rejected it, as did the Fifth Circuit in *Woolard* when similar "reinterpretation" efforts were rebuffed.

B. Review is also warranted because the decision below is at odds with basic principles of statutory construction and separation of powers. The first question that the Court of Military Appeals had to decide was whether Congress had authorized the President to prescribe the necessary aggravating factors. Instead of analyzing the language of the three UCMJ Articles that were cited to support Rule 1004, the court found an "implicit" delegation springing from congressional inaction or acquiescence, lack of stated displeasure, and inferences drawn from other statutes dealing with related, but different matters. On the basis of this implicit delegation, the court allowed the President to embark on an open-ended, unguided process of deciding those factors which do and do not warrant imposition of the death penalty for the various capital offenses. Whether the UCMJ provides the necessary authority in this very sensitive area is itself highly questionable, since all of the provisions relied on were enacted more than 20 years before *Furman*. *See United States v. Woolard*, *supra*, 981 F.2d at 758, rejecting claim that pre-*Furman* statute could satisfy *Furman* mandate. As Judge Fletcher observed in his concurrence in *Matthews*, the notion that Congress actually intended in 1950 to assign these powers to the President "implies



that, as a result of overabundant concern for the rights of servicemembers or as a result of mere happenstance, a unique system for imposing the death penalty evolved in the military without regard for civilian practice." 16 M.J. at 385-86.

But there is a more fundamental problem with an approach under which congressional silence can provide a basis for executive action: "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n. 1 (1989). Nor should congressional silence be construed as endorsement of a regulation issued in the name of a statute. As Justice Scalia forcefully reminds us:

> [O]ne must ignore rudimentary principles of political science to draw any conclusions regarding [congressional] intent from the failure to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

*Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., joined by Rehnquist, C. J., dissenting). As this Court made clear in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 958 (1983), Congress acts in one way only: by enacting laws that are passed by both Houses and signed by the President or enacted by two-thirds majorities over his veto.

The lower court's method for finding the necessary "intelligible principle" to guide the delegee's discretion, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), is similarly problematic. Rather than citing any statutory language guiding the President in selecting aggravators, the court turned to other federal statutes, state laws, and the Model Penal Code to find support for the factors chosen by the President. The court set sail on a wholly novel constitutional course, not followed by any other decision of this or any other Court. While this Court has deferred

to Congress to a considerable degree in passing on claims of excessive delegation, *see Mistretta v. United States*, 488 U.S. 361, 371-80 (1989), it has never sustained a delegation under one law by reference to a delegation under another law, let alone by reference to standards embodied in statutes from other jurisdictions and a Model Code enacted by no one.

This deviation from the norm is vastly compounded by the lower court's reliance on an implicit rather than explicit delegation as the basis from which the "intelligible principle" is to be derived. It is one thing to uphold a sweeping delegation when Congress has made an explicit choice to assign broad policy roles to the executive. It is quite another to do so when the delegation is not even found in a law that Congress passed, but is drawn from implications from other laws and congressional silence. If that theory of delegation were to be upheld, there would be no limits on executive power. Thus, the broad sweep of the lower court's decision provides another basis for review.

C. If the Court of Military Appeals relied on Article 36, App. 363a, its ruling is on no firmer footing. That provision applies only to "pretrial, trial, and post-trial procedures, including modes of proof," language that is far afield from the quite substantive and policy-laden decisions about what factors are sufficiently egregious as to warrant the death penalty. Surely, no one would argue that similar language authorizing this Court to issue rules of civil and criminal procedure, 28 U.S.C. § 2072, could be used to fill the comparable gaps under the federal criminal code, nor that those provisions could have been used to establish sentencing guidelines, yet that would seem to be the inevitable effect of construing Article 36 as the ruling below suggests. It is particularly indefensible to construe Article 36 broadly since the Court of Military Appeals had twice, after *Furman* and before *Matthews*, given it a narrow reading. *United States v. Frederick*, 3 M.J. 230, 236 (C.M.A. 1977); *United States v. Ware*, 1 M.J. 282, 285 (C.M.A. 1976).

Moreover, every state to have adopted death penalty aggravators since *Furman* has done so by legislation. At the very least that suggests that executive action is not the norm and that courts should be reluctant to conclude that Congress intended the UCMJ to grant this kind of power to the President. That view is



confirmed by the multiple references by this Court in *Furman* and other opinions to the role of the legislature in curing the defects in pre-*Furman* laws. *See* Petition at 10-11; *United States v. Harper*, *supra*, and the views of the Justice Department noted therein.

Contrary to the position of the court below, the presence of Article 106a, enacted after Rule 1004 was promulgated, supports petitioner and not the government. Article 106a is limited to espionage cases and specifies three conditions that warrant the death penalty. The fact that Congress was so explicit in this particular area, and that it decided to proceed by statute instead of simply allowing the President to adopt aggravators sua sponte, negates any inference that the President already had the power under Article 36 or otherwise to establish the necessary aggravating factors. Even more persuasive is the presence of the specific grant of authority in Article 106a(c)(4) for the President to add to the listed factors, using the procedures in Article 36. That grant would be wholly unnecessary if Article 36 or any other provision of the UCMJ already gave him that authority.

Another factor suggesting that Congress did not intend to silently empower the President to decide upon aggravating factors is the range of choices that such a decision entails. That can easily be seen from the lengthy list of aggravators that the President compiled for the military death penalty crimes, which include very different factors for the various offenses. See 356a-360a. As the government put it at page 70 of its brief of August 20, 1990, to the Court of Military Appeals in *Curtis*, the death penalty is "different in the character of the moral judgment that accompanies the identification of those circumstances and the conclusion that those circumstances are not outweighed by the available mitigating and extenuating factors." Whatever Congress thought would be included in Article 36's "procedures," moral judgments are plainly not among them.

D. Nor does the mention in Article 56 of the "limits" of punishment for the offense that "the President may prescribe" support Rule 1004. Assuming that the President may prescribe penalties for other offenses under the UCMJ, as this Court has often remarked, "death is qualitatively different." *E.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) That is especially true under the UCMJ because of the manifold roles that Congress

has assigned to the President in capital cases, many of which are inconsistent with his role as decider of which offenses are serious enough to warrant death. As *Weiss v. United States*, 114 S. Ct. 752 (1994), makes clear, the President, through each Service's Judge Advocate General, appoints and may remove all military judges. He is also the ultimate superior of the convening authority for all courts-martial, who appoints the members of the court-martial. Article 25(d)(2), 10 U.S.C. § 825(d)(2). In addition, pursuant to Article 71(a), 10 U.S.C. § 871(a), the President alone has the power to order that a death sentence be carried out or commuted. Moreover, Congress provided in Articles 118(1) and 118(4), under which petitioner was sentenced to death, that the court-martial is to decide whether the accused will receive the death penalty or serve a life sentence without the possibility of parole. Therefore, viewed as a whole, this scheme leaves no room for a Presidential role in establishing aggravating factors in death penalty cases, a conclusion that is reinforced by the specific, but limited, grant of such authority by Congress to the President in 1985 to prescribe additional aggravating factors for the crime of espionage.

E. Construing the UCMJ narrowly to reject a delegation to the President of power to prescribe death penalty aggravating factors would allow the Court to avoid the difficult question of the constitutional validity of such a standardless delegation. *See generally Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct 1759, 1771 (1991); *id.* at 1788-89 (O'Connor, J., dissenting). There is not a word in any statute or the legislative history to show what Congress intended the President to do, or not do, in establishing the aggravating factors for each capital offense. *Compare United States v. Mistretta*, *supra*, 488 U.S. at 375-79 (four page discussion of specifics of delegation). Given the range of choices for each capital offense under the UCMJ, the courts could not possibly determine whether the President complied with any "intelligible principle" for each, when there are essentially no directions under any of these provisions. Yet, *Touby v. United States*, 500 U.S. 160, 111 S. Ct. 1752, 1757 (1991), makes clear that the ability to obtain meaningful judicial review is an essential element of preventing excessive delegation, and that is impossible here.



We do not dispute that there were ample sources for the President to draw on in deciding which aggravating factors to chose for military death penalty cases. Rather, as the Court of Military Appeals proved, App. 368a-374a, the problem is that there are too many possible choices, and no guidance from Congress on how to select among them. Indeed, the court below found that some factors were derived from various federal statutes, others from state laws, and still others from the Model Penal Code, yet there is no rationale for relying on one source rather than another for a given offense — other than the personal predilections of the President, not the considered views of both Houses of Congress.*

F. At least as troubling is the concentration of power which such a delegation would create. In the armed forces, the President is the Commander-in-Chief, and hence the ultimate superior of those who bring charges against every accused. To allow the President to fill this vacuum would be to assign to the superior of the prosecutor the power to decide the circumstances under which an accused may live or die. The Framers were very concerned about uniting in one person the power to both write the laws and execute them, *The Federalist* No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961), as was Congress when it decided to place the Sentencing Commission in the judicial and not the executive branch. S. Rep. No. 98-225 , 98th Cong., 1st Sess. 159 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3342. Even if such a joinder did not violate separation of powers, the Court should not assume that Congress intended such a blending

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*Nor is this a situation, like *Mistretta*, where the job is so complex that Congress could not reasonably have been expected to do it on its own. State legislatures have satisfied the requirements of narrowing in *Furman*, and Congress has done it, although only for espionage, in the military. Moreover, when Congress passed the Federal Death Penalty Act of 1994, which is applicable to a range of federal crimes, and is set forth in 18 U.C.C.A. §§ 3591-98, it specified that the law does not apply to prosecutions under the UCMJ. Public Law 103-322, § 60004, 108 Stat. 1959, 1970 (1994).

of functions in the President unless there is the clearest language authorizing it.

But that presumption against concentration of powers is especially strong here because the Framers were so careful to divide the responsibility for military affairs between the President and Congress. Thus, Article II, § 2 makes the President the Commander-in-Chief, but it is Congress to whom the Framers gave the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, cl. 14. This special and quite specific division of power, beyond that embodied in the basic separation of powers doctrine, suggests a further concern about uniting executive and legislative power in the military context.

In light of the heightened scrutiny which the Eighth Amendment compels where the death penalty is involved, even the most explicit delegation, coupled with carefully drawn standards, would raise serious constitutional issues. Such issues can be avoided by construing Articles 18, 36, and 56 narrowly, thus denying the President the life and death power to promulgate the aggravating factors needed to reactivate the death penalty in the military. Identifying those factors which may place a defendant's life in the balance is precisely the kind of decision that has traditionally been made by legislative bodies who are most responsive to the will of the people, not by a single executive, with no checks and balances on the process.

* * *

The court below fundamentally erred when it assumed that Congress had implicitly delegated to the President the profound question of who shall live and who shall die. That question embodies judgments that go to the heart of our values as a society, and it should never be assumed that Congress would delegate that responsibility without saying so explicitly. Because neither the reasons given by the court below, nor those advanced by the Rule's drafters can sustain Rule 1004, and because of the importance of the issue to the administration of justice in the military, this Court should grant review on Question 1.



## II. THE CONSTITUTIONALITY OF ALLOWING A COURT-MARTIAL OF FEWER THAN TWELVE LAY PERSONS TO IMPOSE A DEATH SENTENCE IS AN IMPORTANT QUESTION OF FIRST IMPRESSION.

While this Court has never held that the Sixth Amendment right to trial by jury applies to courts-martial, the Eighth Amendment protects a capital defendant's right to a reliable process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Article 55 of the UCMJ, which prohibits "cruel or unusual punishment," provides additional protection to service members. 10 U.S.C. § 855; *see United States v. Matthews*, 16 M.J. 354, 368-69 (C.M.A. 1983).

Article 16(1)(A) of the UCMJ allows a panel of as few as five lay members to impose a death sentence. 10 U.S.C. § 816(1)(A). Petitioner was convicted of a capital offense and sentenced to death by a panel of just eight lay members. The imposition of the death penalty by such a small group of lay members is inherently unreliable and, thus, impermissible under the Eighth Amendment.

A state may place the capital sentencing decision in the hands of a single judge, whose specialized training and experience makes him or her uniquely qualified to render such a decision. *Proffitt v. Florida*, 428 U.S. 242 (1976). Yet, with the exception of the military justice system, every jurisdiction in the country which permits lay members to make the capital sentencing decision requires that the panel include twelve members. *See* Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 Ind. L.J. 617, 627 n.45 (1989). Twelve person juries are particularly vital in view of the grave doubts that empirical research has raised about the fairness of any departure below a 12 person jury. *See* Kaye, *And Then There Were Twelve: Statistical Reasoning, The Supreme Court, and the Size of the Jury*, 68 Calif. L. Rev. 1004, 1033 (1980). Thus, even states which provide for smaller juries in non-capital criminal cases, require 12 when death is a possible penalty. *See, e.g.*, Fla. Stat. § 913.10 (1988).

The uniformity of 12 person juries in capital cases is significant because, as this Court has noted, "that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). Accordingly, this gross disparity in jury size is precisely the kind of "unusual punishment" that this Court found unconstitutional when it set aside capital punishment for a person who committed murder when he was under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815, 821-22 (1988).

One of the central themes running through this Court's Eighth Amendment jurisprudence is the concern that the death penalty not be meted out in an arbitrary fashion. But what could be more arbitrary than that petitioner's trial here was by court-martial, with a panel of eight, not a civilian jury of twelve, for what is no more or less than two murders, one punishable by the State of Texas and the other not, only because the fateful taxi ride ended up on a military base instead of in town? That the panel was composed entirely of military personnel — here all commissioned officers — is a necessary by-product of the authority granted the military to try civilian crimes, but that fact has no inevitable effect on the size of the court-martial panel.

Moreover, the UCMJ does not forbid twelve person panels, but only requires that panels cannot include fewer than five members. Article 16(1)(A), 10 U.S.C. § 816(1)(A). Thus, it cannot be said that Congress has a policy *against* twelve person juries in military capital cases, nor could it reasonably be argued that it is difficult to assemble a slightly larger venire than is presently provided since capital cases are tried in peacetime only on major bases and not out in the field or at remote outposts. There is nothing preventing the President from requiring 12 person panels by Executive Order, nor stopping any convening authority in a capital case from increasing a court-martial to that size on his own. Given the importance of 12 person juries in capital cases, the refusal of the United States to accord petitioner that vital protection here invalidates Loving's sentence and, if respondent still wishes to seek the death penalty, his conviction as well.



## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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